SUPREME COURT, U. S.
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-937

NADINE LOUIS, CYNTHIA MOORE, FRANK WEIR, KATHY HORTON, CONSTANCE JONES, VALERIE KERSEY, PATRICIA WALKER and the WEST PHILADELPHIA BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

vs.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY; THE DELAWARE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; and the CHILTON COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS L. SNYDER,
ROBERT W. McCLURE,
JAMES T. COLLIE, JR.,
2323 Grant Building,
Pittsburgh, Pennsylvania 15219,

Attorneys for Respondent,
The Pennsylvania Industrial
Development Authority.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8457

INDEX.

PAGE

Questions Presented 2

Counter-Statement of the Case 2

Reasons for Denying the Writ of Certiorari 4

Conclusion 10

TABLE OF CASES CITED.

City of Pittsburgh v. Milk Marketing Board, 7 Pa. Cmwlth. 180 (1973) 9

Commonwealth v. American Ice Co., 406 Pa. 322 (1962) 10

Day v. Public Service Commission, 312 Pa. 381 (1933).. 9

Delaware River Port Authority v. Pennsylvania Public Utility Commission, 408 Pa. 169 (1962) 9

Green v. Milk Control Commission, 340 Pa. 1 (1940)... 9

Harrisburg Dairies v. Milk Control Commission, 340 Pa. 9, *cert. denied* 312 U. S. 708 9

N.A.A.C.P. v. P.U.C., 5 Pa. Cmwlth. 312 (1972)..... 9

Norwood v. Harrison, 413 U. S. 455 (1973) 5, 6

Shelley v. Kraemer, 334 U. S. 1 (1948) 5

Swarthmore Borough v. Public Service Commission, 277 Pa. 478 (1923) 10

The Civil Rights Cases, 109 U. S. 3 (1883) 4, 5

Western Pennsylvania Water Co. v. PUC, 10 Pa. Cmwlth. 533 (1973) 9, 10

STATUTES.

Pennsylvania Industrial Development Authority Act, Pa. Stat. tit. 73, Section 301 *et seq.* 3, 6, 9, 10, 11

Pennsylvania Human Relations Act, Pa. Stat. tit. 43, Section 952 *et seq.* 6, 7, 9

Pa. Stat. tit. 66, Section 1148 *et seq.* 9

42 U.S.C. §§ 2000e-4 *et seq.* 7

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-937

NADINE LOUIS, CYNTHIA MOORE, FRANK WEIR, KATHY HORTON, CONSTANCE JONES, VALERIE KERSEY, PATRICIA WALKER and the WEST PHILADELPHIA BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

vs.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY; THE DELAWARE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; and the CHILTON COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY

Questions Presented

1. Was the District Court in error in refusing to enjoin the loan procedures of a state industrial development authority, where plaintiffs made no attempt to prove, and deemed it irrelevant to prove, alleged discriminatory employment practices by a loan candidate?

2. Must a state agency arrogate the jurisdiction and duties of another state agency or department without express or implied statutory authority especially where adequate remedies are otherwise available?

Counter-Statement of the Case

The statement of petitioners was prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against the judgment rendered below. In response to petitioners' statement of the case, The Pennsylvania Industrial Development Authority (PIDA) relies upon the opinion of the district court judge, J. William Ditter, as appended to the Petition for Writ of Certiorari, and the counter-statements enumerated below:

1. Neither PIDA nor the Commonwealth of Pennsylvania is indifferent to racial discrimination. Any conclusions to the contrary are both unsupportable by the record of the instant case and contrary to the conclusions of the courts below.

2. Petitioners' allegations of PIDA's failure to consider the employment practice of its industrial development loan applicants were specifically denied by PIDA. A non-

discrimination clause is set forth in the PIDA loan commitment letter and in various closing documents which must be executed by the recipient company before the PIDA funds will be disbursed.[1] PIDA's policy is to refuse to grant or disburse an industrial development loan to any company which is cited by a responsible agency or department to be engaged in discriminatory employment practices.

3. The public purpose and powers of PIDA are set forth in the Pennsylvania Industrial Development Authority Act, Pa. Stat. 73, Section 301 *et seq.* The Act neither expressly authorizes nor implies that PIDA should institute the procedures sought by petitioners.

4. Due to petitioners' unvalidated and uncorrelated statistical data and total lack of direct evidence at trial, the District Court found that no one had been denied employment or promotion due to race by respondent Chilton Company.

---

[1] The non-discrimination clause reads as follows:

> [Industrial occupant] shall not discriminate against any employee in the establishment of the project or against any applicant for employment because of race, religion, color, national origin, sex or age, including but not limited to the following: Employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. (Page 277a of petitioners' Appendix to Court of Appeals)

Reasons for Denying the Writ of Certiorari

Petitioners have not only failed at trial to introduce a scintilla of evidence in support of their allegations of employment discrimination by respondent Chilton Company but have asserted it to be irrelevant to prove such illegal acts and their resultant damages.[2] In so doing, petitioners have ignored the fundamental principal of evidence which requires a plaintiff to prove the alleged wrongful conduct and the injury arising therefrom before a remedy may be granted. At trial, none of the named plaintiffs nor any other individual were called to testify in support of petitioners' allegations of discrimination. Nor did petitioners attempt to validate and correlate, or ask the court to take judicial notice of, the statistical data alleged in their complaint. Without such direct evidence of discrimination, the District Court properly found, and the Court of Appeals properly affirmed, that the remedy sought against PIDA must be denied.

In its reasons for granting a Writ of Certiorari, petitioners have argued that a state may not become a joint participant with racially discriminatory practices of private parties nor abdicate its responsibilities in this regard. This honorable Court has long recognized the evils of discrimination as abetted by color of state action. *The Civil*

[2] See pages 161a-163a of petitioners' Appendix to the Court of Appeals. Although the District Court denied petitioner's motion to eliminate the necessity of proof of discrimination, petitioners made no attempt to satisfy their burden at trial. It is now for the first time asserted by petitioners (page 10, n.2 of Petition) that no proof of discrimination was offered at trial because of the Consent Decree executed by respondent Chilton Company. Since the Consent Decree represented a matter of economic expedience and good faith by Chilton and not an admission of impropriety, its use in lieu of direct evidence at trial is unjustifiable and transcends the bounds of fair play.

Rights Cases, 109 U.S.3 (1883); *Shelley v. Kraemer*, 334 U.S.1 (1948). PIDA unequivocally supports this authoritative body of case law and adopts as its own standards this Court's recent pronouncement in *Norwood v. Harrison*, 413 U.S.455 (1973) that, "[A] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination." *Id.* at 466. The proceedings below are replete with the affirmations of PIDA that it may not, will not and to the best of its knowledge never has made an industrial development loan to a company engaged in discriminatory practices. It is submitted, however, that the *Norwood* decision, and the numerous other cases cited by petitioners do not reach the basic issue of the instant case, *i.e.* does PIDA have the legal duty to itself detect, investigate and adjudicate racial discriminatory matters or may it rely upon other agencies and departments better qualified and specifically authorized for that purpose. The gravamen of the issue, therefore, is not whether PIDA may aid the discriminatory employment practices of private industry but rather the role it must play in protecting the State from such involvement within the frame work of its statutory powers and without jeopardizing the effectiveness of undertaking its public purpose. Several arguments have been asserted below in rebuttal to the remedy here sought by petitioners.

First, PIDA has neither the expertise, manpower nor financial resources to adequately and fairly discern and investigate the possibility of unlawful employment practices of the numerous industrial loan applicants seeking review each month. The governing body of the Authority is its Board of Directors comprised of the Secretary of Commerce, as chairman, four other state cabinet officers and

seven additional members appointed by the Governor.[3] The background of these members is generally limited to banking or related areas of corporate financing. These members as a whole have little practical experience in analyzing the complex and oft times subtle indications of discrimination. Nor would the Executive Director of PIDA and his few administrative assistants be better qualified for such a task.

Secondly, although the petition before this Court has placed great reliance upon the decision in *Norwood, supra,* petitioners have failed to distinguish that, by the nature of the "private discrimination" there involved, alternative procedures and remedies were not available to the Mississippi Textbook Purchasing Board, and, therefore, the task of certifying eligible schools fell uniquely within its province. Such is not the case with PIDA. Numerous entities have been created by the State and Federal governments for the proper detection, investigation and adjudication of discriminatory employment practices.[4] In Pennsylvania, the Human Relations Act, Pa. Stat., tit.43, Section 952 *et seq.*, reflects the intent of the State legislature to entrust in the Pennsylvania Human Relations Commission (PHRC) the responsibility of eliminating unlawful discriminatory practices throughout the Commonwealth. The right to freedom from discrimination in employment is given special emphasis throughout the Act. Furthermore, the Commission's procedures, enforcement and judicial review of violators are designed to comply with the strict man-

---

[3] Pa. Stat. tit. 73, Section 304, *as amended* (Supp. 1974).

[4] See The Substance of American Fair Employment Practices Legislation, 61 Nw. L. Rev. 907, 62 Nw. L. Rev. 19 (1967); also a tabular presentation with references to the particular state laws against employment discrimination is set forth at BNA LRX, pp. 398-99.

dates of due process. Not only is the PHRC the only Pennsylvania agency exclusively empowered by statute to investigate and adjudicate complaints of discrimination but is mandated by the State legislature to use this authority to aid other agencies of the Commonwealth.[5] Similarly, the Equal Employment Opportunity Commission[6] is available on the federal level to investigate, and enforce the eradication of, unlawful employment practices. Direct recourse to State and Federal courts is also available to those aggrieved by discrimination. Upon notice from these or any other appropriate forum of the charge that an industrial development loan candidate or recipient is involved in unlawful employment practices, PIDA will, as it did in the instant case, cease any further consideration of granting or disbursing a loan until the matter is satisfactorily resolved. The learned courts below did not deem that the Commonwealth of Pennsylvania or its agency, The Pennsylvania Industrial De-

---

[5] The following sections of the Pennsylvania Human Relations Act clearly reveal the legislative intent to place authority for the investigation and adjudication of discrimination with the PHRC.

1. The Commission shall have the power and duty ". . . to formulate policies to effectuate the purposes of this Act, and make recommendations to agencies and officers of this Commonwealth . . . to effectuate such policies." Pa. Stat. tit.43, Section 957(e).

2. Where the procedures of the Act against unlawful discriminatory practices are invoked, such procedures shall, ". . . be exclusive and the final determination therein shall exclude any other action, civil or criminal, based upon the same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this act, he may not subsequently resort to the procedure herein." Pa. Stat. tit.43, Section 962(b).

3. "The provisions of the act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply." Pa. Stat. tit.43, Section 962(a).

[6] 42 U.S.C. §§ 2000e-4 *et seq.*

velopment Authority, had abdicated its constitutional duties but had merely placed the functions of detection and investigation of racial practices with the agency designated by statute to be best suited for that purpose. Should PIDA inadvertently make a loan to a company later cited for illegal employment discrimination, the making of such a loan would not adversely affect the remedies available to eradicate any such discrimination. Certainly such a loan could not be said to facilitate, reinforce or support such illegal discrimination.

Thirdly, industrial development loans must be made without delays, and to await hearings, interrogatories, depositions, etc. would effectively destroy the program. To make a faster determination with only partial information, perhaps only statistical, would be as equally undesirable, denying the parties due process. On the other hand, if the PHRC has cited a loan candidate for unlawful employment practices, it can, in its more qualified discretion, advise PIDA to proceed or not with the loan. Any disbursement would be subject to recall if the company, after a proper hearing with PHRC, were found to be in actual violation and refused or failed to voluntarily comply with appropriate enforcement action. If PIDA was required in every case to withhold its loan until this lengthy process were completed, the company's immediate needs for adequate facilities coupled with rapidly increasing construction costs would force it, and the potential employment which it brings, to abandon its plans or locate elsewhere.[7]

[7] The Chilton project is a good case in point. The testimony revealed that, but for the PIDA loan, Chilton Company would probably have moved its entire operation to the State of Delaware—a loss of 1,800 to 2,000 jobs to the Philadelphia area. (pages 286a-287a of petitioners' Appendix to Court of Appeals) Had this occurred, it would have proven detrimental to all Pennsylvania citizens, especially minorities.

Similar cooperation has been successfully enjoyed between PIDA and the Pennsylvania Department of Environmental Resources in matters involving suspected environmental pollution violations. For the courts to place on PIDA the burden of investigating and adjudicating every conceivable violation of the law by a loan candidate would most assuredly emasculate its vital public purpose.

Finally, to adopt and implement the remedies sought by petitioner would be an abuse of PIDA's administrative function and public purpose.[8] The Commonwealth Court of Pennsylvania has spoken quite clearly in the analogous case of *N.A.A.C.P. v. P.U.C.*, 5 Pa. Cmwlth. 312 (1972). In this action involving a complaint filed with the Pennsylvania Public Utility Commission (PUC) by the Pennsylvania Human Relations Commission and the N.A.A.C.P. protesting a rate increase by a local utility allegedly involved in racial discrimination, the court concluded that the PUC had no power to regulate a public utility's employment practices in a rate case because this power is not given to the PUC by the Pennsylvania Public Utility Law, Pa. Stat. tit. 66, Section 1148 *et seq.*, but is explicitly conferred upon PHRC by the Pennsylvania Human Relations Act, *supra*. The court based its conclusion upon the long and well established rule of the courts of Pennsylvania that agencies of State government have only those powers granted by clear expression of the legislature[9] and may

---

[8] Pa. Stat. tit.73, Sections 302-302.1.

[9] See *Green v. Milk Control Commission*, 340 Pa. 1 (1940); *Harrisburg Dairies v. Milk Control Commission*, 340 Pa. 9, (1940); *cert. denied* 312 U.S. 708; *Day v. Public Service Commission*, 312 Pa. 381 (1933); *City of Pittsburgh v. Milk Marketing Board*, 7 Pa. Cmwlth. 180 (1973); *Western Pennsylvania Water Co. v. Public Utility Commission*, 10 Pa. Cmwlth. 533 (1973); *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, 408 Pa. 169 (1962).

not assume authority or power which has not been vested in them by statute.[10] To rule otherwise, noted such a prior decision, would mean ". . . the evil effects of not adhering to the rule . . . soon would reach beyond the confines of this controversy and might invade the whole field of public control."[11] The PIDA Act gives no more authority to conduct a plenary investigation and hearing into racial employment practices than does the Public Utility Law. Nor have petitioners brought to the attention of this Court a single case in support of their contention that a state industrial development authority is constitutionally obligated to review and investigate the racial employment practices of each loan candidate in lieu of the responsibilities mandated to a reciprocal state agency. The delegation of such duties has been left to the discretion of the State legislatures. Thus, it is the states' abdication of such responsibilities, not their relegation which has come under judicial scrutiny.

Conclusion

In the proceedings below, petitioners have failed to sufficiently allege and have deemed it irrelevant to prove employment discrimination by respondent Chilton Company in support of their allegations against PIDA. Nor have they demonstrated the necessity to impose upon PIDA legal duties not contemplated in its enabling legislation. Contrary to the petitioners' statement, there are relatively few other states with analogous agencies to PIDA which

---

[10] *Commonwealth v. American Ice Co.*, 406 Pa. 322 (1962); *Western Pennsylvania Water Co. v. PUC, supra.*

[11] *Swarthmore Borough v. Public Service Commission*, 277 Pa. 478 (1923).

are authorized to grant low interest loans to promote industrial development.[12] However, most every state has expressly vested in some agency the authority to detect, investigate and adjudicate discrimination and unlawful employment practices.[13] It is, therefore, respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the Writ should be granted. It is thus requested that the Writ of Certiorari to review the Judgment-Order of the United States Court of Appeals for the Third Circuit be denied.

THOMAS L. SNYDER,
ROBERT W. McCLURE,
JAMES T. COLLIE, JR.,
2323 Grant Building,
Pittsburgh, Pennsylvania 15219,

Attorneys for Respondent,
The Pennsylvania Industrial
Development Authority.

---

[12] Only six other states have legislation analogous to the PIDA Act: Ill. Stat. Ann. tit.85, Section 891 *et seq.*; Louis. Stat. Ann. tit. 12, Section 951 *et seq.*; New Hamp. Stat. Ann. tit 168A:7 *et seq.*; Gen. Stat. of N. Carolina tit. 123A-1; Vermont Stat. Ann. tit. 10, Section 211 *et seq. as amended*; West Virginia Code, Art. 15, Section 31-15-1 *et seq.*

[13] See note 4 *supra.*